

REMARKS

Claims 1-32 are pending in the subject application, and all of the claims stand rejected. Favorable reconsideration of the application and allowance of all of the pending claims are respectfully requested in view of the following remarks.

Improper Finality of Office Action

As discussed with the Examiner in the telephone interview of record, the finality of the present Office Action is clearly and unambiguously improper under the requirements set forth in the MPEP, and Applicant respectfully requests the Examiner to withdraw the finality of the Office Action.

In accordance with MPEP § 706.07, a second or any subsequent action on the merits shall be final, *except* where the examiner introduces a new ground of rejection that is *not* necessitated by applicant's amendment of the claims. In the Request for Reconsideration filed in response to the Office Action mailed October 3, 2006, Applicant made no amendments to the claims whatsoever, but merely presented arguments explaining why the claims were patentable over the cited prior art. Again, no claims were amended in the Response.

In the present Office Action mailed January 24, 2007, the Examiner has withdrawn all previous grounds of rejection and has introduced all new grounds of rejection. Since the Examiner changed the grounds of rejection from the previous Office Action to new grounds of rejection in the present Office Action, and the present Office Action has been made final, the pertinent question is whether this change in the grounds of rejection to new grounds of rejection was necessitated by claim amendments made by Applicant. Since Applicant made no amendments to the claims in response to the previous Office Action, it is logically impossible for the new grounds of rejection to have been necessitated by claim amendments. Rather, the new grounds of rejection were necessitated by the fact that the Examiner decided the previous rejections could not stand in view of Applicant's arguments. In short, a change in the grounds of rejection was made by the Examiner without any intervening amendments being made to the

claims. Consequently, this change in the grounds of rejection could not possibly have been necessitated by Applicant's amendments to the claims.

Note that the foregoing requirement ("necessitated by amendment") for making an Office Action final is the only test set forth in the MPEP for determining whether the finality of an Office Action is proper under these circumstances. Thus, the fact that Applicant had earlier amended the claims during prosecution (i.e., prior to the previous Office Action of October 3, 2006) or the fact that the finality of the prior Office Action of October 3, 2006 was proper are not relevant to the issue of whether the present Office Action has been improperly made final. It is not the rule that once a claim amendment has been made, all subsequent rejections can be made final. It is also not the rule that an Office Action containing a new ground of rejection can be made final if it would have been properly made final at an earlier time (i.e., in response to claim amendments). The rule does not penalize the Applicant for the fact that the Examiner could have, but did not, timely introduce a new ground of rejection. The inquiry required by the MPEP is: what was the reason for the change from the previous grounds of rejection to the new grounds of rejection. Unless the reason for the new grounds of rejection is that Applicant amended the claims, thereby changing what needed to be considered by the Examiner, the new grounds of rejection cannot be introduced in a final Office Action. Where the Examiner finds Applicant's mere arguments persuasive in overcoming a rejection, as is the case here, the new grounds of rejection must be made in a non-final Office Action, since no amendment necessitated the new grounds of rejection, but merely the Examiner's realization that the prior grounds of rejection were inadequate in some manner.

For the foregoing reasons, holding final the rejection made in the Office action mailed on January 24, 2007 is premature, and Applicant respectfully requests the finality of the rejection be withdrawn. Moreover, since the Office Action should have been non-final, the Examiner should now properly enter and consider the Declaration under Rule 1.131 and supporting evidence described below.

Prior Art Rejections

Claims 1-11, 16-26, 29, and 30 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent Publication No. 2004/0092281 to Burchfiel in view of U.S. Patent No. 6,175,551 to Awater et al. Further, dependent claims 12-15, 27, and 28 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Burchfiel and Awater in view of U.S. Patent No. 5,263,048 to Wade.

Applicant submits herewith a Declaration under 37 CFR 1.131 of the inventor, Dennis McCrady, stating that the subject matter of the instant application in pending claims 1-32 was conceived and reduced to practice prior to October 24, 2002, the effective date of Burchfiel. The Declaration is supported by suitable documentary evidence demonstrating that the invention was made before October 24, 2002. Specifically, the documentation includes a written invention disclosure which predates October 24, 2002. Note, for example, that the text and figure in the documentation closely correspond to the subject matter contained in the subject application, including specific details and operational parameters of an actual, practical implementation. Therefore, Burchfiel is not prior art to the subject matter of the instant application under 35 U.S.C. §102(e) or any other paragraph of §102. Accordingly, withdrawal of this rejection is respectfully requested.

In view of the foregoing, Applicant respectfully requests the Examiner to find the application to be in condition for allowance with claims 1-32. However, if for any reason the Examiner feels that the application is not now in condition for allowance, the Examiner is respectfully requested to call the undersigned attorney to discuss any unresolved issues and to expedite the disposition of the application.

Filed concurrently herewith is a Petition (with payment) for an Extension of Time of One Month. Applicant hereby petitions for any extension of time that may be necessary to maintain the pendency of this application. The Commissioner is hereby authorized to charge payment of any additional fees required for the above-identified application or credit any overpayment to Deposit Account No. 05-0460.

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Respectfully submitted by:

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